Inland Empire Meat Company *and* Harold E. Finnigan. Case 31-CA-7025

May 4, 1981

DECISION AND ORDER

On December 16, 1980, Administrative Law Judge Burton Litvack issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Inland Empire Meat Company, Colton, California, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as modified:

Substitute the figure "$16,684.94" for the figure of "$16,419.43" in the Administrative Law Judge's recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In his Decision the Administrative Law Judge found that employee Finnigan voluntarily absented himself from the job market while he was on his honeymoon from February 2 through March 3, 1977. While the General Counsel concedes that Finnigan voluntarily absented himself from the job market during the period of his honeymoon, he takes exceptions to the finding that the honeymoon began on February 2. In this regard, the General Counsel cites record testimony which shows that Finnigan's honeymoon began on February 7, rather than February 2 as found by the Administrative Law Judge, and ended on March 2. We find merit to this exception and hereby correct the inadvertent error of the Administrative Law Judge. Accordingly, we find, as contended by the General Counsel, that the amount of backpay owed Finnigan for the first quarter of 1977 should be, and hereby is, increased by $265.51. We thus find that Finnigan is owed a grand total of $16,684.94 in backpay.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge: On March 30, 1978, the National Labor Relations Board, herein called the Board, issued a Decision and Order,[1] finding that Inland Empire Meat Company, herein called Respondent, discriminatorily discharged Harold E. Finnigan, herein called the claimant, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act. To remedy the unfair labor practices, the Board, *inter alia*, directed Respondent to offer Finnigan "immediate and full reinstatement . . . to his former job or, if that job no longer exists, to a substantially equivalent position without loss of his seniority or other rights and privileges," and to make him whole for "the amount of his loss of earnings which resulted from his termination . . . ." On November 14, 1979, the United States Court of Appeals for the Ninth Circuit enforced the Board's Order, including its monetary provisions. As the parties were unable to agree on the amount of backpay due under the terms of the Board's Decision and Order, the Regional Director for Region 31 issued a backpay specification, dated April 1, 1980. Respondent filed an answer thereto, generally denying the accuracy of and the premises upon which the figures in the specification were based but without specifically setting forth in detail its position as to the applicable premises or furnishing appropriate supporting figures. In addition, the answer affirmatively alleged that the claimant had failed and refused to report all his interim earnings to the Board; that for certain periods of time, the claimant had voluntarily removed himself from the labor market; that the claimant had not diligently sought employment; and that, in any event, the claimant was an active participant in an economic strike and would not have worked for Respondent during the pendency of said strike. On July 8, 1980, counsel for the General Counsel filed a motion for judgment on the pleadings, and Respondent filed an answer thereto. Upon due notice, on August 14, 1980, a hearing was held before me in Los Angeles, California. All parties were afforded full opportunity to argue orally their respective pretrial positions, to call, examine, and cross-examine witnesses, and to submit briefs.[2] Briefs were filed by counsel for the General Counsel and by Respondent and have been carefully considered. Upon consideration of the entire record herein[3] and upon my

[1] 235 NLRB 500.

[2] At the hearing, inasmuch as Respondent only generally denied the formula, which was utilized to derive the backpay figures and the computations themselves but without offering an alternative formula or backpay computations, I granted counsel for the General Counsel's motion for judgment on the pleadings in that regard and refused to permit Respondent to offer evidence as to the gross amount of backpay owed to the claimant. However, as to whether the duration of a strike herein was properly includable in the backpay award period, I denied counsel for the General Counsel's motion for judgment on the pleadings. While the latter perhaps properly cited and argued the applicable Board precedent, the issue was, and is, not free from doubt and Respondent was entitled to preserve and protect its legal position that participation in a strike, under certain circumstances, tolls the backpay period for the duration of the strike.

[3] After the close of the hearing, Respondent filed a motion to reopen the record to receive an affidavit impeaching the claimant's testimony and a supporting brief. Therein, Respondent moved that the record be reopened to consider the affidavit of Wayne Smith, plant manager and vice president of manufacturing for Universal Feeds, Inc., pertaining to the truthfulness of the claimant's testimony that he submitted an employment application in 1977 to that employer. Copies of Respondent's motion, supporting brief, and the affidavit were mailed to counsel for the General Counsel who submitted no opposing document. Inasmuch as the evidence is similar to evidence already in the record and as counsel for the General Counsel evidently does not oppose the motion and in the interests of due process, I shall permit the record to be reopened to permit the receipt of the affidavit of Wayne Smith into the record and shall consider it as part thereof.

observation of the demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

A. *The Strike*

As previously concluded by the Board, the claimant was unlawfully terminated by Respondent from his position as a delivery driver on November 15, 1976. Until the time of his discharge, the claimant had been the shop steward for International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 166, herein called the Union, which represents Respondent's truckdrivers. In mid-November 1976, Respondent's respective collective-bargaining agreements with the Union and with the Meat Cutters Union, Local 439, which represents Respondent's production employees, expired and, on December 13, 1976, employees who were represented by both labor organizations commenced a strike against Respondent. The claimant, who at all times appeared to be an honest and forthright witness, credibly testified that he did not participate in the Union's strike decision. "I wasn't around, so I wasn't shop steward. I mean, I didn't participate in anything. I didn't even participate in a vote on the strike . . . ."

Despite the foregoing, the record does disclose that the claimant actively participated in the strike. Thus, from the start of the strike until February 1, 1977, the claimant visited the picket line four or five times for 15-minute to 2-hour periods to speak to strikers. Although maintaining that he merely greeted and conversed with the pickets on these occasions, the claimant admitted that there was nothing to distinguish him from the strikers. After he returned from his honeymoon on March 3, 1977,[4] the record discloses that his strike activities significantly increased. According to the claimant, at least three or four times a week, he either picketed at the plant or followed Respondent's trucks, picketing around them at delivery locations. Pete Espudo, the Union's vice president and business agent, testified that while participating in the strike, the claimant would remain on the picket line for approximately 5 hours each day.

Espudo further testified that in mid-April 1977 the Union's national headquarters advised him that strike benefits for Respondent's truckdrivers would be ended as of April 19. Accordingly, while the delivery drivers never formally ended their strike by offering to return to work for Respondent,[5] all picketing activities ceased as of April 19, and Espudo advised the drivers to seek employment elsewhere. The record establishes that the claimant visited the Meat Cutters picket line on one other occasion in mid-summer 1977 to attend, along with the other delivery drivers, a barbecue in honor of the strikers.

In January 1978 the claimant became self-employed, starting his own trucking business. On September 22, 1978, he received an offer of reinstatement from Respondent to his former job.[6] According to the claimant, he refused the offer inasmuch as "I had already started up in business myself, and I just decided to go ahead and stay with my own business."

Based upon the foregoing, Respondent argues that the claimant was a fervent supporter of the Union's strike and that, as such, he would not have worked for Respondent either during the period of the picketing or thereafter. Accordingly, Respondent asserts that the backpay period herein should be tolled for the duration of the strike. Assuming a contrary position, counsel for the General Counsel argues that Respondent has failed to meet its burden of proof that the claimant would have gone on strike absent the unlawful discharge and that, consequently, the backpay period should not be tolled.

Although factually distinct, Respondent's arguments are not novel. Thus, the Board has traditionally found in situations, such as herein involved that, after his discharge, a discriminatee should receive backpay for the period of a subsequent strike. *Polynesian Cultural Center, Inc.*, 222 NLRB 1192, 1194, fn. 12 (1976); *The Rogers Mfg. Co.*, 178 NLRB 429 (1969); *Rice Lake Creamery Company*, 151 NLRB 1113 (1965). The most cogent explication of this policy is found in *Winn-Dixie Stores, Inc.*, 206 NLRB 777 (1973). Therein, the Board stated:

> [It] has consistently held, in cases involving employees who have been unlawfully discharged before an economic strike is called, that the entire duration of the strike is includible in the backpay award period because the employer's own discrimination . . . makes it impossible to ascertain whether [the] claimant would have gone on strike in the absence of the discrimination and the resulting uncertainty must be resolved against the employer.

In *N.L.R.B.* v. *Rogers Mfg. Co.*, 406 F.2d 1106 (1969), the United States Court of Appeals for the Sixth Circuit refused to enforce a Board Order, concluding that the Board's foregoing rationale was defective insofar as it does not take into consideration the discriminatee's strike activity. However, on remand, the Board adhered to its rationale, concluding that the nature of the discriminatee's strike activities only makes it more uncertain whether he would have joined the strike and that the uncertainty must be resolved against the employer. *Rogers Mfg. Co., supra* at 430. Moreover, in *Winn-Dixie*, the Board specifically stated its disagreement with the Sixth Circuit. *Supra* at 778.

While the extent of an unlawfully terminated individual's strike activities does not appear to be a relevant factor in clarifying the uncertainty as to whether he would have joined the strike, Respondent correctly points out that the Board, in *Winn-Dixie*, placed major emphasis upon the absence of an offer of reinstatement

[4] The claimant admitted that from February 2 through March 3, 1977, he was in the State of Louisiana on his honeymoon. Counsel for the General Counsel concedes that the claimant voluntarily absented himself from the job market during this period and makes no claim for backpay for this period.

[5] The Meat Cutters strike and picketing continued.

[6] At no point from the end of picketing by the Union until receipt of Respondent's offer of reinstatement did the claimant or any other striking truckdriver unconditionally offer to return to work.

by the respondent therein and concluded that the discriminatee's resulting decision to accept or reject the offer would have resolved any lingering uncertainty as to whether he would have initially participated in the strike. Herein, an offer of reinstatement was tendered to the claimant, and he rejected it. Therefore, Respondent asserts, no uncertainty remains that the claimant would have gone out on strike along with the other truckdrivers. Contrary to Respondent, while I also believe the reinstatement offer is a relevant factor herein, I do not agree that there no longer exists uncertainty as to what the claimant would have done on December 13, 1976. Thus, I note that Respondent's offer was tendered approximately 2 years after the strike commenced and at a time when the claimant had been self-employed for, at least, 9 months. The latter credibly testified that he refused Respondent's offer because he desired to continue in his own business. There is no contrary evidence in the record, and it would be utter speculation to conclude that his alleged support for the Union and the ongoing strike were factors in his decision. Therefore, I do not believe it to be free from doubt that the claimant would have joined the strike absent his discriminatory discharge, and any uncertainty in this regard must be resolved against Respondent. *Polynesian Cultural Center, supra; Winn-Dixie, supra.* Accordingly, I hold that the entire duration of the economic strike herein is includible in the backpay award period.

B. *The Claimant's Search for Work*

Respondent, contrary to counsel for the General Counsel, asserts that the claimant's backpay should be reduced because he made little or no effort to diligently seek gainful employment during the backpay period.

An employer may mitigate its backpay liability by establishing that the claimant "willfully incurred" loss by a "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, 199-200 (1941). However, this is an affirmative defense and the employer has the burden of proof. *Aircraft and Helicopter Leasing and Sales, Inc.*, 227 NLRB 644, 646 (1976). The employer does not meet this burden by establishing lack of success; rather, the employer must affirmatively demonstrate that the individual "neglected to make reasonable efforts to find interim work." *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575-576 (5th Cir. 1966). In this regard, the evidence must establish that during the backpay period there were sources of actual or potential employment that the claimant failed to explore. *Isaac and Vinson Security Services, Inc.*, 208 NLRB 47, 52 (1973). However, "While the evidence may leave a question as to whether [the discriminatee] could have been more diligent in seeking other employment, the highest standard of diligence is not required . . . ." *Otis Hospital*, 240 NLRB 173 (1979). Rather, the individual is held "only to reasonable exertions in this regard." *N.L.R.B.* v. *Arduini Manufacturing Corporation*, 394 F.2d 420, 432 (1st Cir. 1968). Finally, it is well settled that any uncertainty in the evidence is to be resolved against Respondent as the wrongdoer. *Otis Hospital, supra; American Medical Insurance Company, Inc.*, 235 NLRB 1417, 1420 (1978); *Isaac and Vinson, supra.*

According to the backpay specification, the period, for which it is claimed that Finnigan is owed backpay by Respondent, commenced November 15, 1976, the date of his unlawful discharge, and continued through December 1977, at which point he became self-employed. As pointed out above, counsel for the General Counsel concedes that the claimant voluntarily removed himself from the job market from February 2 through March 3, 1977, the period of his honeymoon, and seeks no back wages for that period. Careful analysis of the record discloses that the claimant made extensive efforts to obtain work during the backpay period but was unsuccessful. Thus, he signed the Union's out-of-work list and spoke to Pete Espudo and other business agents numerous times about work. "[W]hen I went in to the office, it was always for the same thing. Nothing more. It was a job and I frequented the office quite often. Maybe at least two or three times a week." However, the claimant's main efforts at obtaining work during the backpay period were personal—consisting of no less that 138 visits or telephone calls to employers for any available truckdriving positions.[7] He credibly testified that he filed employment applications with several employers, that these contacts were in and around the Riverside, California, area but that none of his job inquiries were fruitful. Thus, the claimant maintained that he was unable to obtain employment until he became self-employed in January 1978.

While asserting that Finnigan made less than diligent efforts to gain employment and, in fact, "decided to live on the salary of his wife . . ." Respondent adduced no evidence that truckdriver positions were available in the Riverside area for which the claimant did not apply; that he turned down any such job offers; or that the claimant did not pursue all potential employment leads. Rather, Respondent sought to satisfy its affirmative burden of proof by discrediting the testimony of the claimant. Thus, the claimant testified that he was involved in a jury trial on November 16, 1977, but also that he applied for work at Arrowhead Linen in San Bernardino, California, on that date. Explaining this apparent conflict, the claimant averred that he was not sure when he visited the prospective employer but that it might have been at the close of the trial that day.[8]

Next, the claimant testified that he visited the Oro Wheat Baking Company in Rialto, California, on April 1, 1977, but did not fill out an employment application because "they weren't taking applications." Seeking to discredit the claimant, Respondent offered the testimony of William V. Ganter who testified that he had formerly been involved in the hiring of employees for Oro Wheat and that it was Oro Wheat's policy "that everybody that

[7] Approximately 20 employers were contacted more than once by the claimant.

[8] The record establishes that in at least two other instances, the accuracy of the claimant's recollection of dates is questionable. Thus, he erred in recording the date on which he returned from his honeymoon and the date when he applied for work at Frito-Lay in Rialto, California. Accordingly, while it cannot be said with certainty that the claimant correctly stated the date of his visit to Arrowhead Linen, I credit his uncontroverted testimony that he did apply for work there.

applied was given an application. We did not turn down any applicants." While testifying that his job duties included interviewing applicants, Ganter could not recall the claimant and admitted that when he was not present, others spoke to job applicants. Likewise, the claimant testified that on one occasion, he visited the office of Circle T Meats in Riverside, was told by a secretary that no truckdriving jobs were available, and, therefore, did not fill out an application. Again seeking to discredit the claimant, Respondent offered the testimony of Roy Tompkins, the president of Circle T Meats, who stated that all applicants were given employment applications to fill out even if no jobs were available. However, Tompkins admitted that he personally interviewed no applicants. Finally, the claimant testified that on January 14, 1977, he visited the office of Universal Feeds, Inc., in Colton, California, filled out an employment application, but was told no jobs were available. Again seeking to discredit the claimant's testimony, Respondent offered the affidavit of Wayne Smith, plant manager for Universal Feeds, Inc., who stated that he examined the company's calendar year 1977 employment applications but found none on behalf of the claimant.

In a further attempt to discredit the testimony of the claimant. Respondent offered the testimony of Roger Smith, a licensed private investigator. He testified that he was instructed to investigate the alleged employment contacts of the claimant. According to Smith, he contacted 21 of the prospective employers who were named by the claimant. When asked whether he was able to verify that the claimant had, in fact, applied for work at these places in 1976 or 1977, Smith replied, "I was unable to determine if anybody had ever heard of Harold Finnigan or Harold E. Finnigan."

At the outset, Respondent produced no evidence to show that there were jobs available which would have been offered had the claimant applied or that he rejected any job offers. Rather, Respondent relied upon its examination of Finnigan and alleged impeaching testimony. As I have previously credited the testimony of Finnigan, I do not believe that Respondent has met its affirmative burden of proof that the claimant did not diligently seek work during the backpay period. *Amshu Associates, Inc., and Spring Valley Garden Associates; and Sam Halpern and Mark Weidman, a Co-partnership, d/b/a Kennedy Realty Company*, 234 NLRB 791, 794 (1978). Moreover, I believe approximately 138 employment contacts in a 13-month period constitute a more than diligent search for work. *Waukegan-North Chicago Transit Company*, 235 NLRB 802 (1978).[9] Finally, the testimony of Respondent's witnesses Ganter, Tompkins, and Smith establishes absolutely nothing. Thus, as to Ganter and Tompkins, others may have interviewed the claimant and, in the absence of more probative evidence, his testimony with regard to Oro Wheat and Circle T Meats remains uncontroverted and credited. As to the testimony of witness Smith, its purpose and supposed value remain a mystery to me. Finally, assuming the validity of the testimony of Wayne Smith with regard to Universal Feeds, Inc., I do not believe that this detracts from the substantial mass of uncontroverted evidence regarding the claimant's search for work.

Accordingly, I find that Respondent has failed to establish that the claimant did not make a diligent search for employment during the backpay period. *Waukegan-North Chicago Transit Company, supra; Kennedy Realty Company, supra.*

C. *Finnigan's Availability for Work*

Respondent argues that the participation of the claimant in picketing, coupled with his refusal of the offer of reinstatement while the strike was ongoing, is significant to demonstrate that his prounion sentiments and activities made him unavailable for work during the strike period. Assuming *arguendo* the validity of Respondent's assertion with regard to the claimant's union sentiments, it is unclear whether counsel for Respondent is referring to the claimant's availability for work in general or for Respondent in particular. If the latter, I have already concluded, in accordance with Board precedent, that whatever the claimant's union sentiments during the strike period, such do not for a certainty establish that he would have struck Respondent on December 13, 1976, if he had not previously been discriminatorily discharged. Further, I have credited the claimant's testimony that his decision to refuse Respondent's offer of reinstatement was based upon business considerations and nothing more. Hence, it cannot be said with a certainty that because of his union sympathies, the claimant would not have been available for work or would not have returned to work during the earlier strike period absent a general offer to return by the Union, which, in any event, has traditionally been a test rejected by the Board. *Winn-Dixie, supra* at 778.

If counsel means that because of his strike activities, the claimant was unavailable for work in general, Respondent has not affirmatively met its burden of proof in this regard. There is no evidence that any jobs were available for which the applicant failed to apply because of the strike. Likewise, there is no evidence that he rejected employment because of the strike. Rather, as aforementioned, the record establishes that the claimant diligently searched for work during the strike and ceased doing so only after becoming self-employed. In short, Respondent has not met its affirmative burden of proof in this regard. *Rice Lake Creamery Company, supra.*

Finally, the record discloses that the claimant performed work for his brother-in-law for approximately 3 weeks during the backpay period and that during 1 of these weeks—in November 1977—he worked on a job at Norton Air Force Base, supervising while his brother-in-law was absent. Respondent asserts that the claimant voluntarily removed himself from the labor market for these 3 weeks. Counsel for the General Counsel argues that there is nothing in the record to suggest that the claimant could not have rearranged his work schedule to engage in any employment which he may have been offered. In any event, the record is unclear as to the exact nature of the claimant's work for 2 of the weeks during which he worked for his brother-in-law or as to whether

[9] In *Waukegan*, 106 employment contacts over a 34-month period were found by the Board to constitute a diligent search for work.

he worked on a fixed schedule or a predetermined number of hours. In these circumstances, any uncertainty or lack of clarity must be resolved against Respondent as the wrongdoer, and I find that it has not affirmatively established that the claimant was unavailable for work during these 2 weeks. Accordingly, I shall order backpay for these periods. However, as to the claimant's work at Norton Air Force Base for his brother-in-law, it appears that for the 1-week period, said work was regular and of such a nature that the claimant voluntarily was not in the job market for that period. Accordingly, I shall not include this week in the backpay period.

On the basis of the foregoing findings of fact, conclusions, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[10]

The Respondent, Inland Empire Meat Company, Colton, California, its officers, agents, successors, and assigns, shall make whole Harold E. Finnigan, the claimant herein, by payment to him in the amount of $16,419.43.[11] This sum shall be payable in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). There shall be deducted from the above amount social security taxes and income tax withholding as required by Federal and state laws.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] By calendar quarters, the claimant is owed the following amounts:

1976-4	$1,115.85
1977-1	$2,968.68
1977-2	$4,055.12
1977-3	$4,304.24
1977-4	$3,975.54
	$16,419.43